Chesapeake and Potomac Telephone Company *and* Communications Workers of America, AFL-CIO. Case 5-CA-11932

November 21, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 10, 1981, Administrative Law Judge Benjamin Schlesinger issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief,[1] the General Counsel filed cross-exceptions and a brief in response to Respondent's exceptions, and the Charging Party Union filed a brief in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Chesapeake and Potomac Telephone Company, Washington, D.C., its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Administrative Law Judge found that an early 1979 letter from the Union to Respondent stated that the Union did not engage in prearbitration discovery. However, no such statement appears in the letter. This apparently inadvertent error does not affect our decision.

DECISION

STATEMENT OF THE CASE

BENJAMIN SCHLESINGER, Administrative Law Judge: This proceeding was heard by me in Washington, D.C., on January 26-27, 1981. Based on an unfair labor practice charge filed on February 15, 1980, by Communications Workers of America, AFL-CIO (the Union), a complaint issued on July 3, 1980, alleging that Respondent Chesapeake and Potomac Telephone Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*, by refusing to furnish to the Union certain information concerning pending arbitration. Respondent denied that it violated the Act in any manner and set forth numerous affirmative defenses including, *inter alia*, the untimely filing of the charge under Section 10(b) of the Act, and the past practice, waiver, estoppel, and the burden of complying with the Union's request.

Upon consideration of the entire record in this proceeding,[1] including my observation of the demeanor of the witnesses, and the briefs submitted by the General Counsel, Respondent, and the Union, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

I find, as Respondent admits, that it is a New York corporation engaged in the installation and maintenance of communications services at its Washington, D.C., location. During the 12 months preceding the issuance of the complaint, a representative period, Respondent had gross revenues in excess of $1 million and purchased and received from points located outside the District of Columbia goods and services valued in excess of $50,000. I conclude, as Respondent admits, that it is an employer engaged in commerce and in operations affecting commerce as defined in Section 2(2), (6), and (7) of the Act.

I further find and conclude, as Respondent admits, that the Union is and has been a labor organization within the meaning of Section 2(5) of the Act. At all times material herein, Respondent has recognized the Union as the exclusive collective-bargaining representative of its employees in a unit appropriate for collective bargaining consisting of all nonsupervisory and nonconfidential employees employed in various job classifications by Respondent at its Washington, D.C., Virginia, West Virginia, and Maryland facilities. The agreement in effect at the times pertinent to this proceeding contained a detailed three-step procedure, followed by arbitration, for the resolution of employees' grievances.[2]

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

In late 1978,[3] employee Dennis Henson was suspended for 2 days for his use of an "improper tone of voice" when speaking with one of Respondent's customers. Henson grieved his suspension and, following the failure of Henson's immediate supervisor to remove the suspen-

[1] Certain errors in the transcript are hereby noted and corrected.

[2] Only the Union has the right to file grievances, and only certain grievances may be arbitrated.

[3] Despite the fact that this proceeding was exhaustively litigated, there does not appear in the record the date when the underlying alleged discipline occurred. Nonetheless, the parties, in their equally exhaustive briefs, have stated that the discipline took place in or about the time indicated, which I have accepted as fact.

sion, the grievance was appealed to the second step. There, and on or about December 19, 1978, Michael M. Agnew, the executive vice president of the Union's Local 2336, pressed Henson's claim and, during discussion with Edison, a representative of Respondent, requested various documents. He was permitted to examine (but not allowed a copy of)[4] all documents pertaining to Respondent's actions, both positive and negative, concerning Henson; and Edison read to him (Agnew was not allowed to read it himself) the policy guide that Respondent used to discipline Henson. Agnew asked whether Respondent's records showed that any other employee had been suspended for the same offense. Edison replied that she did not know of any and would not supply a list of names of such employees in any event. The second-step conference ended without agreement on the underlying grievance.

At the third-step conference held on February 13, 1979, Charles Sangmeister, a union staff representative, was the Union's chief spokesman. During the course of the meeting, because Respondent's representative stated that it was standard policy to suspend emoloyees for using an improper tone of voice, even for the first time, Sangmeister asked Respondent's supervisors to produce Respondent's policies showing that employees guilty for the first time of usinq an improper tone of voice had to be suspended and for the names of those employees who had been similarly suspended. Respondent's representative stated that he did not have the names of persons disciplined and would not produce them if he had.

On February 14, 1979, the Union filed its demand for arbitration, there being a time limit of 2 weeks to do so after the parties failed to agree in the third step. At that point, as has been customary in the handling of these disputes, the Union's attorney assumed control of the grievance. In reviewing the files, Attorney Michael A. Murphy realized that his information was insufficient to permit him to make a judgment as to whether to arbitrate Henson's grievance, settle it, or withdraw it. Because he failed to receive a favorable response to his request of Respondent for information, he issued on October 10, 1979, two subpenas, signed by the designated impartial and union arbitrators,[5] one requiring Respondent to produce, prior to the arbitration, the "name of each employee fired, suspended, or given a final warning solely for an improper tone of voice toward a customer during the last five years." On October 11, 1979, Respondent's legal department responded that it would "not honor such a request since we view it as pre-arbitration discovery. As you well know, it has never been our practice to engage in such discovery prior to an arbitration hearing."

The arbitration hearing was scheduled, delayed, and postponed, from time to time, on request of the Union, which in December 1979 sought unsuccessfully to enforce its subpena in the United States District Court for the District of Columbia. After the district court dismissed the Union's complaint, the Union filed the unfair labor practice charge which initiated this proceeding; rescheduled the arbitration for hearing on September 4, 1980; still later, on June 9, 1980, renewed its request of Respondent for the same material; and finally refused to hold the arbitration hearing pending the disposition of the instant proceeding.

B. *Credibility*

There is one factual finding *supra*, which deserves some discussion, that is, whether in the second and third steps, union representatives requested documents pertaining to the discipline of other employees for the offense of which Henson was accused. Despite the testimony of Agnew and Sangmeister, Respondent claims that the Union's minutes of the grievance meetings show no such demand for information. Respondent's minutes also contain no such reference.

Respondent contends, therefore, that the testimony was fabricated. Its argument is not without some appeal, especially because the Union did not immediately file an unfair labor practice charge against Respondent. However, Respondent's argument might have been persuasive had one of Respondent's eight representatives at the two grievance meetings testified in supoort of Respondent's position. However, not one of them testified at the hearing. No excuse for their nonappearance was presented, and I infer from their absence that they would not have supported Respondent's present contentions. *Golden State Bottling Co., Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento* v. *N.L.R.B.*, 414 U.S. 168, 174 (1973); *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)* [*Gyrodyne Co. of America*], 459 F.2d 1329, 1335–39 (D.C. Cir. 1972); *Fred Stark and Jamaica 201 St. Corp., Inc. and Jamaica 202 St. Corp., Inc.*, 213 NLRB 209, 214 (1974), enfd. 525 F.2d 422, 431 (2d Cir. 1975), cert. denied 424 U.S. 967 (1976). Because the minutes were neither verbatim nor recorded by professional note takers, because of the possibility that the discussions at the time of the requests by Agnew and Sangmeister were proceeding so rapidly that no scrivener was able to record the requests, and because of my conclusion that the testimony of Agnew and Sangmeister was not so improbable or unreliable that it should be discredited, I find that the demands for the information were, in fact, made as they related.[6]

C. *Discussion*

N.L.R.B. v. *Acme Industrial Co.*, 385 U.S. 432 (1967), the Supreme Court held that the duty to bargain in good faith includes the obligation of an employer to disclose to its employees' collective-bargaining representative

[4] See *Communications Workers of America, AFL-CIO, Local 1051* v. *N.L.R.B.*, 644 F.2d 923 (1st Cir. 1981).

[5] The arbitration provision provides for a tripartite arbitration panel; one arbitrator chosen by the Union; one, by Respondent; and the third, by the two parties' designated arbitrators.

[6] Respondent contends that grievances were always held "open" awaiting review of information not supplied by Respondent to the Union. That is accurate to a point, that is, when Respondent agreed to supply the requested information, which it has not done in the instant proceeding. That Sangmeister, when given documents by Respondent relating to the Henson grievance after arbitration had been filed for, did not protest Respondent's failure to produce the names of other employees similarly disciplined is not persuasive. Sangmeister had already been advised that his request would not be honored.

such material as is relevant and reasonably necessary to permit the representative to administer the terms and provisions of the agreement. See also *Trustees of Boston University*, 210 NLRB 330, 333 (1974); *Montogmery Ward & Co., Incorporated*, 234 NLRB 588, 589 (1978). In *Acme*, the material was requested to permit the representative to determine *whether* to pursue a grievance to arbitration, and Respondent would be hard pressed to argue that, if such were the purpose of the demand herein and this proceeding arose prior to the Union's demand for arbitration, it would not be obliged to submit to the Union such material as it had.

But Respondent's complaint, in essence, is that once arbitration was requested hy the Union, the Union was no longer deciding whether the grievance was meritorious. Rather, it had already made that determination and was now seeking to use its demand to prove its case—that is, the Union's request is actually one for prearbitration discovery, which Respondent contends is permitted neither by law nor by logic nor by public policy. Prior decisions, however, do not support Respondent's claim. It has been held numerous times that the duty to supply information extends to a request for material to prepare a grievance for arbitration. *The Fafnir Bearing Company*, 146 NLRB 1582, 1586 (1964), enfd. 362 F.2d 716, 721 (2d Cir. 1966); *St. Joseph's Hospital (Our Lady of Providence Unit)*, 233 NLRB 1116, 1119 (1977); *Designcraft Jewel Industries, Inc.*, 254 NLRB 791 (1981); *The Kroger Company*, 226 NLRB 512 (1976); *Fawcett Printing Corporation*, 201 NLRB 964, 972–973 (1973); *Metropolitan Life Insurance Company*, 150 NLRB 1478, 1485–86 (1965); *Cook Paint & Varnish Co.* v. *N.L.R.B.*, 648 F.2d 712, 712–716 (D.C. Cir. 1981).[7]

So many of the arguments made by Respondent are answered in one or more of these decisions that it is really unnecessary to proceed through the list of Respondent's claims. Suffice it to say, the list of the Union's grievance was that Henson, even if he did use an improper tone of voice, should not have been suspended for 2 days, because no other employee had been similarly disciplined, and that Henson's offense warranted at most a warning under Respondent's policy of progressive discipline.[8] Thus, whether other employees had not been suspended for a similar offense became critical to the Union. If the material requested by the Union had been produced prior to the Union's demand for arbitration, such documents may have supported the Union's claim of disparate treatment and could have been submitted to the arbitrator. In essence, any request by an employee's representative for information prior to the arbitration demand constitutes prearbitration discovery, albeit that the request is also motivated by the representative's desire to determine whether to proceed to arbitration.

The Union's requests for the same information after filing for arbitration attempt to fulfill the very same functions, enabling the Union to "decide what role it will seek to play," *Florida Steel Corporation* v. *N.L.R.B.*, 601 F.2d 125, 128 (4th Cir. 1979); that is, whether arbitration is worthwhile if the Union cannot prove its claim of disparity. If it cannot, testified Union Attorney Murphy, the grievance might well have been withdrawn, as other of the Union's grievances have been withdrawn within several weeks of the scheduled arbitration hearing. Respondent argues that making it supply the requested material would destroy the ease and informality of arbitration proceedings, would unnecessarily delay the arbitration hearing, and would wrongly inject the Board into the arbitration process, in which it has no expertise. However, these contentions have essentially been answered by the Supreme Court in *Acme Industrial Co.*, 355 U.S. at 438–489, as follows:

> Far from intruding upon the preserve of the arbitrator, [the production of the requested documents herein would be] in aid of the arbitral process. Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would he woefully overburdened. Yet, that is precisely what the respondent's restrictive view would require. It would force the union to take a grievance all the way through arbitration without providing the opportunity to evaluate the merits of the claim.

"Arbitration," as used in the above quotation, means the "arbitration hearing." Until the hearing commences, the arbitrator's sole function is to schedule a time and date for the hearing. It is the hearing which the Supreme Court believed might be avoided by the exchange of information so that those grievances which had no merit might be withdrawn. Accordingly, I conclude that, unless Respondent's affirmative defenses are meritorious, Respondent has violated Section 8(a)(5) and (1) of the Act by failing to comply with the Union's request for information.

[7] Both of the decisions on which Respondent places principal reliance are distinguishable. In *Tool & Die Makers' Lodge 78, IAM [Square D. Company], 224 NLRB 111 (1976), the Board dismissed the 8(b)(3) complaint because there had been no showing that the requested documents were relevant. In Sinclair Refining Company*, 145 NLRB 732 (1963), the complaint that the employer had refused to produce documents prior to arbitration was dismissed as moot since the arbitration had already been held and the employer produced the requested documents at the arbitration. The Board noted, nonetheless, that the employer had not met its bargaining obligations when it refused the union's request which was relevant to the union's responsibility "in policing or administering a contract, or adjusting a grievance . . . " (*Id.* at 733.)

[8] Respondent's personnel department guide G-805 (guide) provides that there are four distinct types of disciplinary measures of ascending degrees of severity: (1) reprimands; (2) warnings; (3) suspensions; and (4) dismissals. It is recommended, but not required, that discipline must follow that order and that, generally, employees should be suspended only after reprimand and warnings have been tried to no avail. Further, supervisors are advised that the discipline they mete out should be impartial, take into consideration all the facts and circumstances of the case, and "be consistent with the penalties assigned for similar behavior situations in the past. Data on previous, similar cases can be obtained from the Personnel Department-Labor Relations Staff." The fact that Respondent contends herein that its discipline of Henson did not follow a "cookie cutter" approach, but was based solely on the facts of Henson's offense is not to the point. *Transport of New Jersey*, 233 NLRB 694 (1977). The requested information was necessary to the union's case.

D. *Respondent's Defenses*

1. Past practice

Respondent contends that the past practice under its agreements with the Union mandates a finding that the complaint herein be dismissed. It cites a 1953 arbitration award, in which an arbitrator disposed of the Union's motion for Respondent's production of documents in advance of the hearing by noting that he had no right, prior to the opening of the hearing before him, to require such production; but he did require the production of certain requested material at the hearing which is the procedure which Respondent claims is the only proper course of action herein. Respondent further contends that it has never permitted prearbitration discovery, has not allowed for depositions of witnesses (although there does not appear from the record that the Union ever requested depositions), and has consistently rejected the Union's attempts to obtain interrogatories (no examples were given). Specifically, Respondent points to (1) a November 20, 1978, request by the Union for information concerning a grievance involving employees Lamp and Bragg, which request was rejected by Respondent on November 21, 1978; and (2) a union letter in early 1979 stating that it did not exchange witnesses' lists or engage in prearbitration discovery.[9]

The General Counsel and the Union rely, however, on Respondent's practice, at least from 1971, of supplying personnel files to the Union for its inspection (and sometimes copies thereof), a practice which since 1974 has been incorporated in the collective-bargaining agreements. Further, they note that, in four grievance proceedings, copies of documents other than personnel files have been supplied by Respondent. In 1973, in a grievance involving employee Critchfield, who was terminated as a result of making personal telephone calls from customers' telephones, Respondent's investiqation after the Union had requested arbitration revealed additional violations by the employee. It consulted with the Union's counsel, who had thought that the employee's offense had been his first, and it turned over the new material to union counsel, as a result of which the grievance was withdrawn from arbitration. In early 1979, in a grievance involving employee Shacreaw, who was terminated because she could not perform her work resulting from an on-the-job injury (according to the Union) or from a preexisting ailment (according to Respondent), the Union demanded, and Respondent supplied, a copy of Shacreaw's medical files. In that same grievance proceeding, Respondent also requested various documents from the Union and, when the Union did not comply, filed an unfair labor practice charge alleging that the Union violated Section 8(b)(3) of the Act by failing to supply "information relevant and necessary to [Respondent's] . . . preparations for the arbitration." In mid-1979, the Union demanded, and Respondent complied therewith, a copy of certain training material that employee Herbert had used in instructing other employees so that the Union could prove that she was entitled to a management differential. In November 1979, Respondent made available to the Union's attorney, prior to the scheduled arbitration, the personnel and medical files of Denise Thompson, so that "the parties can reach an understanding as to whether or not this will actually be heard."

Respondent contends generally that the production of material to the Union's attorneys has been merely a matter of "professional courtesy," but no explanation has been given why "professional courtesy" cannot constitute a past practice. If, in fact, counsel for Respondent and the Union have been regularly exchanging material, a practice which Respondent concedes in its orief was engaged in "in order to save time at the beginning of the hearing," that is as much of a practice affecting the rights of employees covered by the collective-bargaining agreement as any other practices concerning terms and conditions of employment.

Specifically, Respondent takes issue with the General Counsel's and the Union's contentions concerning Critchfield and Shacreaw.[10] As to the former, Respondent explains that the material consisted of after-acquired documents which had not heen discussed with Respondent during the three-step grievance procedure and that it felt it was necessary to disclose the material to the Union to avoid a claim of surprise. Curiously, it also argues in its brief that it supplied the information to the Union to persuade it to withdraw the grievance, a result which happily was accomplished. The upshot of Respondent's argument, therefore, is that it will supply information when it feels that it will lead to the avoidance of an arbitration hearing, but it will not comply with a union request, even though the Union's object may be the same.[11] Further, I find no logical distinction in the fact that the material turned over in the Critchfield grievance was acquired after the Union had filed for arbitration. The fact remains that Respondent furnished the material while a grievance was pending arbitration.

I similarly reject Respondent's contention regarding Shacreaw, as to whom it claims that Virginia law required it to exchange medical records regarding a workmen's compensation claim. Murphy testified that Shacreaw's compensation claim had heen disposed of and whatever state requirement had existed was no longer applicable.[12] Respondent's defense that there was a past practice forbidding the exchange of information after arbitration had been filed for must be rejected; it appears

[9] Respondent's assistant vice president for personnel, Albert Sears, testified that Respondent has never honored any written request by the Union for records prior to an arbitration hearing. I discredit his testimony for two reasons: first, because there is documentary testimony to the contrary; second, because of the thoroughness of the presentation of Respondent's case, I am persuaded that all written evidence of past practice was submitted at the hearing, and there is no more.

[10] Respondent's compliance with the Union's requests in the Herbert and Thompson grievances is unexplained.

[11] In the Thompson grievance, Respondent's attorney suggested that he would continue to supply information to the Union in advance of the hearing "in order to facilitate the Union's preparation for an arbitration hearing [which procedures] . . . will obviate the need to involve arbitrators in pre-hearing matters."

[12] Respondent's brief also argues that "under established Bell System and C & P policy, employees are entitled to a release of their medical information upon signing the proper authorization form." Respondent's brief cites no page references, and I find no record support for this assertion.

that the past practice was quite to the contrary.[13] Furthermore, Respondent's alleged reliance on the 1953 arbitration award is misplaced. The arbitrator there did not decide when the Union was entitled to obtain the requested documents, but whether the Union was entitled to them. Indeed, he stated that he was entitled to rule on the question only when the arbitration hearing formally commenced. The actual past practice of the parties is more persuasive than the almost 30-year-old award.

2. Waiver

Respondent's position with respect to the Shacreaw grievance is also relevant to its claim of waiver, because, with respect to Shacreaw, Respondent's labor relations general counsel, Dworski, testified to "our contract was superseded by state law and we had a duty in fact to give the medical file to Shacreaw."[14] Why that duty was not waived, as Respondent contends in this proceeding, because the collective-bargaining agreement provides for the supply to the Union only of personnel records and for the conduct of arbitration hearings in accordance with the Voluntary Labor Arbitration Rules of the American Arbitration Association (AAA rules), is wholly unexplained. I conclude that the Act and the decisions of the Board and the courts interpreting the Act are at least as worthy of yielding to as is the Virginia statute, and that the Act was specifically incorporated in the agreement, by operation of the agreement itself.

In any event, assuming that Dworski's explanation of the Shacreaw incident was not definitive, Board law is clear that any waiver of the riqhts granted by the Act must be clear and unequivocal.[15] *Westinghouse Electric Corporation, 239 NLRB 106, 110 (1978), enfd. as modified 648 F.2d 18 (D.C. Cir. 1980); California Portland Cement Company*, 101 NLRB 1436, 1438–39 (1952); *Hekman Furniture Company*, 101 NLRB 631 (1952), enfd. 207 F.2d 561 (6th Cir. 1953). See also *Florida Steel Corp.* v. *N.L.R.B., supra* at 129–130; *Timken Roller Bearing Co.* v. *N.L.R.B.*, 325 F.2d 746, 751 (6th Cir. 1963); *Communications Workers, Local 1051* v. *N.L.R.B., supra*. I cannot find such a waiver herein. Although the procedural rights in the conduct of the arbitration hearing may be governed by the AAA rules, there is nothing therein which abolishes the rights for the production of material which the Union may find necessary to decide whether to pursue a grievance to arbitration. Nor does the inclusion of the Union's right to obtain copies of employees' personnel records exclude the Union's right to ohtain other information necessary to make a judgment whether to proceed to arbitration. *California Portland Cement Company, supra; Globe-Union, Inc.*, 233 NLRB 1458, 1460 (1977). Indeed, the impact of the AAA rules upon the rights of the Union to receive documents prior to an arbitration hearing was never discussed by the parties to the collective-bargaining agreement. Finally, Respondent's attempt in the Shacreaw grievance to obtain material from the Union prior to the arbitration, its filing of an unfair labor practice charge when the Union did not comply with its request, and its November 1979 letter to the Union in connection with the Thompson grievance that it would continue to afford the Union complete access to all relevant documents to facilitate the Union's preparation for arbitration hearings belie Respondent's argument that it thought that it was the written understanding of the parties to the collective agreement that the right to obtain material had been waived.[16]

3. Collateral estoppel

The Union's proceeding in the United States District Court does not have any binding collateral estoppel effect on the instant dispute. Read in the best light for Respondent, the court's decision held only that there was no right under the United States Uniform Arbitration Act to require the production of documents prior to the arbitration hearing. It is not clear, however, that this holding was anything more than dicta, because the court noted that it had no *in personam* jurisdiction because of the Union's failure to serve a summons, as required by rule 4 of the Federal Rules of Civil Procedure. In no event can the court's decision be read as a finding that the Act does not permit the production of the supenaed material. That was neither relied on by the Union, nor raised by Respondent, nor adjudicated by the Court,[17] which has no jurisdiction under the Act to make a binding determination that Section 8(a)(5) has or has not been violated.[18]

[13] There is no evidence that the Union ever turned over material to Respondent; rather, the record indicates that the Union always refused to do so. Whether this is equitable, or what the effects of the Union's actions are, I withhold judgment because the matter is not before me. It should be restated that the right of grievances and arbitration is a unilateral one. Only the Union may grieve, and only as to specific matters. Only the Union is concerned with the ultimate decision of whether to process a grievance to arbitration.

[14] Art. 15 of the applicable collective-bargaining agreement provides in part as follows:

> Should any Federal or State law or the final determination of any court of competent jurisdiction or any proclamation or order having the force of law at any time affect the provisions of this Agreement, such provision shall be construed as having been changed to the extent necessary to conform to such law or decision.

[15] This assumes, *arguendo*, that the Union's right to information to enable it to fulfill its duties as a collective-bargaining representative may be waived. See *N.L.R.B.* v. *Magnavox Company of Tennessee*, 415 U.S. 322, 325 (1974).

[16] Respondent argues that, by reason of its past practice, the Union's right to information has also been waived. I have previously found that the past practice has been that Respondent has supplied such information. In any event, a waiver by virtue of past practice must be equally "clear and unmistakable." *Native Textiles*, 246 NLRB 228 (1979). Respondent also arques that the Union made no attempt, after the 1953 arbitration award, to change the arbitration clause of the collective-bargaining agreement, thus demonstrating that the award barred, and the Union understood that it barred, prearbitration discovery. Even if the Union had attempted to change the arbitral provision, and had been unsuccessful, Board law still would have found no waiver. *The Proctor & Gamble Manufacturing Company*, 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979); *The Timken Roller Bearing Company*, 138 NLRB 15, 16 (1962).

[17] Collateral estoppel applies only to "situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding." *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 597–598 (1948).

[18] In support of its position, Respondent cited *N.L.R.B.* v. *Walter E. Heyman, d/b/a Stanwood Thriftmart*, 541 F.2d 796 (9th Cir. 1976), for the proposition that "the grant of jurisdiction under Section 301 gives the district courts the powers necessary to enforce judgments and makes those judgments binding through the doctrines of *res judicata* and collat-

Continued

4. Bad faith

Nor may it fairly be said that the Union exhibited bad faith, as claimed by Respondent. It is true that, in one instance, the Union applied to the impartial arbitrator, *ex parte*, for a postponement of the arbitration hearing and that the Union attempted to delay the holding of the hearing until it was satisfied that it had a reasonable case to present. But that has no bearing on whether the Union was sincere in its efforts to obtain material which it believed relevant to prove Henson's claim that his suspension constituted disparate discipline, a claim which Respondent contends is made by the Union in 80 percent of the arbitration hearings and which appears, on the basis of this record, to be a relevant and material consideration for disposition by the arbitration panel.[19] Moreover, there are a number of expenses which the Union sought to avoid and which would appear to justify the Union's actions if it could not prove disparity—the expenses of the arbitration, the hearing room, attorney's fees, and the witnesses, not the least of whom was Henson, who at the time of the hearing was employed in California. *The Fafnir Bearing Company*, 146 NLRB at 1587.

I am persuaded that the Union desired to represent Henson and to pursue his grievance, if a reasonable claim could be made. I find no bad faith on its part.

5. Section 10(b)

Respondent claims that the Union's charges were untimely under Section 10(b) of the Act because the alleged violation arose in December 1978, at the second-step grievance meeting or, at the latest, on February 13, 1979, at the third-step grievance meeting; and the charge was filed more than a year later. However, within the 6 months prior to the charge, the Union had served its subpena request[20] for the same dooument that it sought before, albeit for an additional reason. In the grievance step meetings, it requested the material in order to decide whether to pursue the grievance to arbitration. The object of the subpena request was the same *and* was to prepare for the arbitration if the information supplied by Respondent supported the Union's claim. The violation of Section 8(a)(5) and (1) found herein is a continuing violation, because Respondent has refused to bargain; that is, it has refused to give to the Union the documents necessary for the Union to make a judgment whether to proceed to the formal arbitration hearing and to prepare for that arbitration. Board law holds that each request for information and each denial by Respondent constitute a separate and independent violation of the Act. *Ocean Systems, Inc.*, 227 NLRB 1593, 1594, fn. 5 (1977). Respondent's refusal to comply with the subpena request, standing alone, and without reference to any other refusal, was a denial to the Union of information necessary to enable it to decide whether to proceed to and prepare for the arbitration hearing. See *N.L.R.B.* v. *Preston H. Haskell Company*, 616 F.2d 136, 140–142 (5th Cir. 1980).

The Board's theory of "continuing violations" has been upheld by many circuit courts of appeals. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO* v. *N.L.R.B.*, 363 F.2d 702, 706–707 (D.C. Cir. 1966); *N.L.R.B.* v. *Joseph T. Strong, d/b/a Strong Roofing and Insulating Co.*, 386 F.2d 929, 930–931 (9th Cir. 1967), reversed on other grounds 393 U.S. 357 (1969); *J. Ray McDermott & Co., Inc.* v. *N.L.R.B.*, 571 F.2d 850, 858 (5th Cir. 1978); *N.L.R.B.* v. *Basic Wire Products, Inc.*, 516 F.2d 261, 267–268 (6th Cir. 1975). But its support has been far from universal. *N.L.R.B.* v. *Serv-All Co.*, 491 F.2d 1273, 1275 (10th Cir. 1974); *N.L.R.B.* v. *McCready and Sons, Inc.*, 482 F.2d 872, 875 (6th Cir. 1973); *N.L.R.B.* v. *Field & Sons, Inc.*, 462 F.2d 748, 750–755 (1st Cir. 1972); (rationale questioned in *McCready*); *General Marine Transport Corporation* v. *N.L.R.B.*, 619 F.2d 180, 186–188 (2d Cir. 1980). It is clear that, until this conflict is resolved by the Supreme Court, I must apply Board law and dismiss the instant defense. *Capitol Foods, Inc. d/b/a Schulte's IGA Foodliner*, 241 NLRB 855, 856 (1979).

6. Burden

Dworski testified that he was advised by his legal staff that compliance with the Union's demand would require going through the personnel records of all employees involved with customer handling to determine whether anyone had ever been disciplined for an offense similar to that which Henson had been accused of. He stated that there is no listing or central record of such offenses and that warnings might not show in files in any event, because oral final warnings are not necessarily recorded.

On the other hand, Respondent has a policy, in line with its progressive discipline standard, that if a supervisor desires to determine the type of disciplinary action required for a particular infraction, the supervisor is to call Respondent's labor relations department, which will advise it of the type of disciplinary action that has been administered in the past based on records the department keeps for similar instances. Respondent's guide requires that all warnings be recorded in detail. Further, in the third-step grievance procedure, Respondent's representative advised the Union that Respondent always gave a 2-day suspension for the offense Henson was accused of. And, just a week before the hearing herein, Sangmeister represented the Union in yet another grievance meeting where the issue presented was a suspension for a first offense. Respondent's representatives stated that they checked with the labor relations department and ascertained that other employees had been suspended for similar offenses. Finally, Dworski admitted that Respondent maintains a summary of discipline, with broad categories of dismissals and suspensions. There are, therefore, suffi-

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eral estoppel in such forums as the NLRB." The court there made clear, however, at 800, that: "Were the Board to have found unfair labor practices extrinsic to the collective bargaining agreement . . . the Board would properly be operating solely within its own jurisdictional authority," and no *res judicata* effect need apply.

[19] This finding is made solely for the purposes of this proceeding. The panel, if the Henson case is finally arbitrated, has full latitude to dispose of the disparity issue, which the panel may find is irrelevant.

[20] Respondent takes no issue with the fact that the request for documents was made by subpena, rather than in any other manner, noting that "there is no legitimate distinction" in the manner of making the request and that, in the words of Respondent's brief, "A rose by any other name is still a rose."

cient indicia that there are such records which may be easily gathered by Respondent.

I am not persuaded that the search for the records will be as difficult as Dworski contended. First, I find that his principal concern was with the general doctrine of prearbitration discovery and not with the burden thereof. Indeed, he related that it was not particularly the Union's demand for 5 years of records which primarily concerned him. It was the principle of discovery which was troublesome, and a demand for any shorter period of time would have been equally offensive. Second, his testimony concerning what was in Respondent's files was general, vague, secondhand, and contradictory, in that he also testified that Respondent also maintained a general discipline summary, which he *thought* did not include warnings, but contained broad categories of dismissals and suspensions. My impression is that, with the care exhibited in the hearing of this proceeding, Respondent possesses and maintains more easily accessible records than Dworski was willing to admit, especially in light of Respondent's documented policy. Third, this impression is further supported by Dworski's letter, dated July 25, 1980, in which he complained to the impartial arbitrator of the Union's request, noting, in part, that "some of [the information] is simply not available to" Respondent, which indicates that other of the information is available, without undue burden.

Finally, I reject Respondent's claim that the Union, by making inquires of its members and leaving messages on its telephone, may obtain the same information that Respondent is withholding. The Board has held that the union may not be subjected "to a burdensome procedure of obtaining desired information where the employer has the information available in a more convenient form." *The Kroger Company*, 226 NLRB at 513; *Pacific Telephone and Telegraph Company*, 246 NLRB 327 (1979); *N.L.R.B.* v. *Borden, Inc.*, 600 F.2d 313, 318 (1st Cir. 1979).

7. Other defenses

During the course of the hearing, Respondent raised other defenses which, by reason of their absence from its brief, have apparently been abandoned. Because Respondent is not restricted from pursuing these defenses, should exceptions be filed to this Decision, I note that I am singularly unpersuaded that, merely because the Union filed for arbitration the Henson grievance, the controversy lost its character as a grievance. There are too many references to "grievance" in the article of the agreement concerning arbitration to hold otherwise (i.e., "In any grievance arbitrated," "grievances which are arbitrable," and "The decision of the umpire will resolve the grievance"). Respondent knows this is so; for, when it filed an unfair labor practice charge against the Union in the Shacreaw matter, it complained that the documents it sought were "relevant and necessary to the Company's processing of the grievance and its preparations for the arbitration."

Respondent also impliedly contended that article 6 of the agreement, requiring Respondent to furnish monthly certain information pertaining to employees' names, addresses, job classifications, wages, and dues deductions, restricted the Union's right to other information. Notwithstanding that this defense was not specifically raised in Respondent's answer, it is clear that this information related to the Union's administration of its internal affairs and had nothing to do with either grievance matters or with documents which the Act requires to be furnished. Furthermore, this article was never referred to by Respondent in limiting the Union's right to information. In the Denise Thompson grievance proceeding, Respondent stated that it would review the Union's request for information utilizing the standards of the Act. In settling an 8(a)(5) charge arising out of Respondent's failure to supply copies of documents requested by the Union, Respondent agreed to furnish such documents "when such information is relevant to a pending grievance"—without any reference to article 6. Finally, Respondent's principal negotiator testified that the only provision of the agreement which had a bearing on the Union's right to information prior to an arbitration hearing was that concerning the AAA rules. I conclude that Respondent's contention has no merit.

CONCLUSIONS OF LAW

By virtue of the foregoing, I conclude that Respondent, by not furnishing the requested material, violated Section 8(a)(5) and (1) of the Act. Respondent's activities set forth in this section II, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom. I shall also recommend that Respondent, upon request, furnish the Union with a list of the names of each employee fired, suspended, or given a final warning solely for using an improper tone of voice toward a customer during the last 5 years. In this regard, the Union contends that all it is looking for is the same kind of information that Respondent would show to its own supervisor who was attempting to decide what kind of discipline should be imposed on an employee such as Henson. It is not the intention of this Decision to require Respondent to search through thousands of files. On the other hand, Respondent should make reasonable efforts to comply with the Union's request and, if there is still a claim of burden, attempt to reach some accommodation with the Union so that information is supplied. If there is still further dispute, that may be resolved in the compliance stage of this proceeding. *Food Employer Council, Inc., et al.*, 197 NLRB 651 (1972).

The Union has requested the imposition of costs and attorney's fees, under *Tiidee Products, Inc.*, 194 NLRB 1234 (1972), and *Hecks, Inc.*, 215 NLRB 765 (1974). I find that Respondent's claims are not so frivolous and lacking in merit as to warrant this relief. Finally, the

Union also requests that the recommended Order should direct Respondent to furnish copies of all relevant information requested concerning the processing of a grievance at any stage of the grievance and arbitration process. This requested relief *in haec verba* is obviously too broad and may well impinge upon the jurisdiction of the arbitrator at the actual hearing.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[21]

The Respondent, Chesapeake and Potomac Telephone Company, Washington, D.C., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Communications Workers of America, AFL-CIO by refusing to furnish it with information that it requests which is relevant and reasonably necessary to the processing and evaluation of grievances and preparing them for arbitration.

(b) In any like or related manner engaging in conduct in derogation of its statutory duty to bargain in good faith with the Union, and in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Furnish the Union with a list of the names of each employee fired, suspended, or given a final warning solely for using an improper tone of voice toward a customer during the 5 years preceding and inclusive of October 10, 1979.

(b) Post at its Washington, D.C., facility copies of the attached notice marked "Appendix."[22] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Communications Workers of America, AFL-CIO, by refusing to furnish it with information that it requests which is relevant and reasonably necessary to the processing and evaluation of grievances and preparing them for arbitration.

WE WILL NOT in any like or related manner engage in conduct in derogation of our statutory duty to bargain in good faith with the Union, and in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL furnish the Union with a list of the names of each of our employees fired, suspended, or given a final warning solely for using an improper tone of voice toward a customer during the 5 years preceding and inclusive of October 10, 1979.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY

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[21] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[22] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."